Office Supreme Court, U.S.
FILED
NOV 7 1983
ALEXANDER L. STEVAS,

No. 83-558

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

HENRI and MARY TATRO, individually and as Next Friends of AMBER TATRO, a Minor,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Courts below were correct in holding that under the Education of the Handicapped Act, as amended, Amber Tatro is entitled to clean intermittent catheterization as a "related service" to enable her to attend school and thereby benefit from special education.

2. Whether the Courts below were correct in holding the Petitioner's refusal to provide catheterization services to Amber had the effect of denying her the benefits of and excluding her from participation in Petitioner's federally assisted program on the basis of her handicap, in contravention of Section 504 of the Rehabilitation Act of 1973, as amended.

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STATEMENT OF THE CASE

Amber Tatro is a female child of normal intelligence who is disabled by the birth defect of myelodysplasia, more widely known as "spina bifida," an orthopedic handicap within the meaning of 20 U.S.C.§1401(1). Among the effects of Amber's handicapping condition are speech impediments, mobility impairment and a neurogenic bladder. As a result of her bladder dysfunctoin, involving an inability to retain urine or voluntarily empty her bladder, Amber must be catheterized every three to four hours in order to avoid excessive pressure within the bladder and the attendant risk of infection. Clean intermittent catheterization ("CIC") is a simple procedure whereby a small tube is inserted approximately one inch into the urethra in order to drain the bladder of urine. Although the procedure must be prescribed by a physician, it need not actually be perfomed by a physician or nurse. With approximately thirty minutes of training, an average layperson can learn to perform CIC safely in about five minutes, and Amber herself should be able to self-catheterize when she is not much older. In Petitioner's neighbor, the Dallas Independent School District, CIC is regularly provided by school personnel to children who need it. Scottish Rite Hospital in Dallas has offered to train Petitioner's personnel, free of charge to the school district, in the administration of CIC.[1]

After Amber reached the age of three, at which time she became eligible under state and federal law for a free appropriate public education as a handicapped child, her parents Henri and Mary Tatro requested CIC as part of Amber's individual educational program (IEP). In May of 1979, the school district recommended placement of Amber in Petitioner's Early Childhood Development classes and agreed to provide the related services of physical therapy, occupational therapy and speech

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1. As to the latter two points, see the testimony of Dr. George Hart, Transcript at 241-242, 255, 283-284, 288-289.

therapy. However, Petitioner, a recipient of federal financial assistance (see App. 61a, 81a), refused to provide CIC to Amber, whereupon pursuant to their rights under 20 U.S.C. § 1415(b)(2), the Tatros presented their complaint to a due process hearing before an Impartial Hearing Officer. The Impartial Hearing Officer ruled that CIC is a related service which Irving I.S.D. is required to provide to Amber under 20 U.S.C. § 1401 *et seq.*, which ruling was adopted as the Decision of the State Commissioner of Education in *Amber T., bnf Mary T. v. Irving Independent School District*, TEA Docket No. 115-SE-579 (August 6, 1979). Although precluded by 20 U.S.C. § 1415 from reviewing the decision of the Impartial Hearing Officer (see footnote 7 below), nevertheless the State Board of Education illegally reversed the Commissioner and Impartial Hearing Officer and affirmed Petitioner's refusal to provide CIC to Amber Tatro.

Following the illegal action of the State Board of Education, Plaintiffs/Respondents filed suit in the United States District Court for the Northern District of Texas, Dallas Division, against the State of Texas, members of the State Board of Education, Irving Independent School District, and the Irving I.S.D. Superintendent and school board trustees. Plaintiffs sought an injunction ordering CIC services for Amber, as well as money damages, under, *inter alia*, the Education of the Handicapped Act, as amended by the Education For All Handicapped Children Act of 1975, 20 U.S.C. § 1401 *et seq.*; and Sec tion 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. On December 21, 1979, Hon. Patrick Higginbotham, U. S. District Judge, entered an order denying a preliminary injunction to require the Defendants to provide CIC to Amber Tatro, Petitioner's Appendix (App.) at 86a, whereupon the Tatros appealed to the Fifth Circuit.

Because counsel for Defendant/Petitioner Irving I.S.D. had refused to sign (without informing Judge Higginbotham of the refusal) the proposed stipulations solicited by the District Court and submitted by Plaintiffs, the Court of Appeals had no facts before it on appeal. App. 4a. However, the Court held as a matter of law that CIC is a valid related service, under 20 U.S.C. § 1401 *et seq.* and 29 U.S.C. § 794, which Petitioner is required

to provide to Amber Tatro, to the extent that Amber needs such in order to attend school so that she can benefit from special education. "*Tatro I*" (App. 94a.) The Court of Appeals remanded the case to the District Court to determine whether the facts of the case were as assumed by the Circuit Court, based on the proposed stipulations, and whether any other material facts not previously considered should alter the result. App. 95a-96a.

Subsequently, the parties entered into stipulations in a Pre-Trial Order and the District Court below took evidence at trial and in subsequent evidentiary hearings, on the basis of which Judge Higginbotham made findings of fact consistent with those assumed by the Court of Appeals on the prior appeal, ordered Defendants to provide CIC to Amber Tatro, and awarded limited damages and attorneys' fees to Plaintiffs. App. 1a, modified by Order and Memorandum Opinion, App. 55a, 62a. From that final order, Defendants Irving I.S.D. and the State Board of Education appealed. On April 25, 1983, the Court of Appeals rendered its second decision in the case, "*Tatro II*," holding that neither its prior decision nor the District Court's subsequent decision were clearly erroneous and affirming the District Court decision. App. 64a. After its request for rehearing *en banc* was denied, App. 84a, Appellant Irving Independent School District petitioned this Court for a Writ of Certiorari.

ARGUMENT: THE PETITION SHOULD BE DENIED

I. The Decision of the Court of Appeals is Correct and is not in Conflict with the Decision of any Federal Court.

The Education of the Handicapped Act as amended by the Education For All Handicapped Children Act of 1975, 20 U.S.C. § 1401 *et seq.*, is a program of cooperative federalism designed to assist states and local school districts in providing education programs to handicapped children. A state which elects to receive money under the EHA must provide each of its school-aged handicapped children with, *inter alia*, a "free appropriate public education." 20 U.S.C. § 1412(1). Local educational agencies, such as Petitioner, have parallel obligations. 20 U.S.C. §

1414(a)(1)(C)(ii). A "free appropriate public education" is defined in pertinent part as "special education and related services." § 1401(18). Each of these terms is then further defined. Special education is "specially designed instruction . . . to meet the unique needs of a handicapped child," §1401(16), and related services are:

> transportation, and such developmental, corrective, and other *supportive services* (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) *as may be required to assist a handicapped child to benefit from special education,* and includes the early identification and assessment of handicapping conditions in children.

20 U.S.C. § 1401(17); App. 110a (emphasis added). The District Court and the Court of Appeals below held that, for Amber, CIC is a valid related service which the Petitioner must provide to her so that she can attend school and benefit from the special education program offered there. This decision is correct and is consistent with the only other Court of Appeals decision which has dealt with the issue. *Tokarcik v. Forest Hills School District*, 665 F.2d 443 (3rd Cir. 1981), *cert. denied sub nom. Scanlon v. Tokarcik*, ____ U.S. ____, 102 S.Ct. 3508 (1982).

The decisions of the District and Circuit Courts in *Tokarcik* and *Tatro* fit securely within the words of the statute. Catheterization is agreed to be a "supportive service," e.g., App. 103a, and all four of the lower Courts in *Tatro* and *Tokarcik* found as a fact that the service is needed by a child with Amber's handicap in order to attend class without undue risk to her health. App. 15a, 74a; *Tokarcik, supra*, at 455–459. The logic of the Third and Fifth Circuits is compelling—that "without the provision of CIC, Amber cannot benefit from the special education to which she is entitled, for, without CIC, she cannot be present in the classroom at all." *Tokarcik, supra*, at 457;

Tatro I at App. 104a. Consequently, CIC is a supportive service[2] needed to assist Amber to benefit from special education.[3]

The District Court and Court of Appeals in the instant case further held that Petitioner's denial of catheterization effectively denied Amber the benefits of and excluded her from participation in its special education program, in contravention of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended [App. 111a] (hereinafter "Section 504"). By depriving Amber of a service she needs, solely on account of her handicap, in order to participate in and benefit from Petitioner's federally assisted program, Petitioner clearly violated Amber's rights as an otherwise qualified handicapped individual under Section 504.[4] As noted by the Court of Appeals, its interpretation and application of this Court's ruling in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), is consistent with

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2. Even if, improbably, CIC were held not to be a "related service" or "supportive service" within the meaning of § 1401(17), it still would have to be considered a "supplementary aid [or] service" within the meaning of 20 U.S.C. § 1412 (5)(B), which requires that a handicapped child not be removed from the regular educational environment unless her "education in regular classes . . . cannot be achieved satisfactorily," even "with the use of supplementary aids and services." Clearly CIC is a supplementary aid or service needed to enable Amber to be educated satisfactorily (in this case, safely) in the regular educational environment. See *Tatro I* at App. 102a, 106a-107a.

3. In *Hairston v. Drosick*, 423 F. Supp. 180 (S.D. W.Va. 1976), cited with approval by the Second Circuit in *Kampmeir v. Nyquist*, 533 F.2d 296 (2nd Cir. 1977), and by the Third Circuit in *Tokarcik, supra*, at 458, the Court, on the basis of the EHA and Section 504, enjoined the school district either from excluding the disabled girl because of the services she required due to spina bifida (undoubtedly including CIC) or from requiring that the child's parent be responsible for such services.

4. The only other decision of which Respondents are aware concerning CIC for a spina bifida child to attend school is *Sherer v. Waier*, 457 F. Supp. 1039 (W.D. Mo. 1977), in which the plaintiffs relied on Section 504. The Court dismissed the action without prejudice so that the plaintiffs could

that of other Circuits in their post-*Davis* decisions on Section 504. App, 79a, citing *New Mexico Ass'n for Retarded Citizens v. New Mexico*, 678 F.2d 847 (10th Cir. 1982). See also *Shirey v. Devine*, 670 F.2d 1188 (D.C. Cir. 1982) at 1201-1202 n.36; *Cook v. U.S. Dept. of Labor* 688 F.2d 669 (9th Cir. 1982); *Dopico v. Goldschmidt*, 687 F.2d 644 (2nd Cir. 1982) at 650-653.

II. The Decision of the Court of Appeals does not Warrant Review by this Court as a Matter of Significant Public Importance.

While the decisions below are of enormous significance for Amber—meaning the difference (for a girl of normal intelligence) between attending regular public school classes with other children her age, on the one hand, and exclusion from public school and segregation in a school only for the handicapped on the other hand—their impact is marginal at most for the Irving Independent School District, other state and local educational agencies, and the public at large.

In both *Tatro* and *Tokarcik*, the Courts found as facts that CIC is simple and inexpensive, is not time-consuming, and does not have to be performed by a physician. App. 10a and

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Note 4 — (*Continued*)

exhaust administrative remedies available from the Department of HEW (now Education) Office of Civil Rights (OCR), the executive agency charged with enforcing Section 504. Subsequently, OCR ruled that the child was entitled to CIC under Section 504. *North Kansas City (Mo.) School District*, 3 EDUCATION FOR THE HANDICAPPED LAW REPORTS 257:04 (November 29, 1978). Every Circuit Court to address the question has since concluded that Section 504 provides a private right of action without requiring prior exhaustion of administrative remedies. See cases cited in *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980) at 131, *vac. and rem. on other grounds*, 451 U.S. 390 (1981). *Cf. Cannon v. University of Chicago*, 441 U.S. 677 (1979) (private right action under 20 U.S.C. § 1681 *et seq.*), and *Guardians Ass'n v. Civil Service Comm'n*, ___ U.S. ___, 102 U.S. 3221 (1983) (private right of action under 42 U.S.C. § 2000d). In the instant case, the Plaintiff/Respondent Tatros exhausted their OCR remedies and obtained a ruling (with which Petitioner refused to comply) that Amber is entitled to CIC under Section 504.

elsewhere; *Tokarcik, supra*, at 446, 457. Since spina bifida only occurs in one or two of every 1000 births and not all children with spina bifida need CIC, *Tokarcik, supra*, at 457, schools will not be called upon often to provide this service. Nevertheless, in a futile attempt to elevate the instant case to a matter of great public significance, Petitioner suggests that the Court of Appeals decision might "require that any medical treatment prescribed by an attending physician [must] be performed and paid for by the education agency if a general health hazard might result otherwise," and could necessitate the "creat[ion of] 'national health care' through the public school system . . ." Petition for Writ of Certiorari at 6. The decision, of course, does no such thing. Relying on the plain words of the statute and regulations, the Court of Appeals has carefully circumscribed the scope of related services so that it cannot conceivably encompass "*all* medical treatment." For any "life support service" to be a related service mandated by the EHA, it *first* must be provided to a recipient who is handicapped and in need of special education within the meaning of the Act; *second*, it must be needed to assist the handicapped child to benefit from the special education to be provided (so that a life support service would not be a required related service if not needed during "school hours"); and *third*, it must be a service which a non-physician can perform.[5] App. 68a-69a, 104a-105a. Similarly, the Court of Appeals in *Tokarcik, supra*, found that "the regulations themselves place realistic limitations on the nature of the school services to be provided under the EAHCA," so that "the drastic medical services . . . which the school authorities fear they will be asked to furnish in the future are by definition excluded." *Id.* at 456.

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5. Petitioner asserts that it "understands that medical treatment such as kidney dialysis is delegated to and performed by technicians and nurses." Petition at 9. Thus, argues Petitioner, the lower decision "would transform this obvious medical treatment into a related service because it can be prescribed and delegated by a physician." *Id.* Of course, Petitioner's "understanding" is not in evidence in this case, although Petitioner had three opportunities (before the Impartial Hearing Officer and twice before the District Court) to introduce evidence on the point. Respondent "understands" that kidney

Petitioner uses the adjective "medical" misleadingly in an attempt to take advantage of the EHA's exclusion of strictly "medical" procedures (other than medical diagnosis and evaluation) from the ambit of "related services." However, a number of services which could be considered "medical" in other contexts (e.g., for insurance purposes) nevertheless are included within the meaning of "related services" and thus are not treated as "medical" under the EHA. It is not uncommon in law for a term to have a broad meaning in general usage but to have a more restricted application in a particular statute. Thus, the EHA includes as related services "physical therapy" and "audiology," which in most states must be prescribed by physicians and which are provided by personnel usually regarded as medical or paramedical. 20 U.S.C. §1401(17); App. 110a. Consequently, the implementing Department of Education regulations confine the term "medical services" to those services which can only be performed by a physician (as opposed to those which are merely prescribed and delegated by a physician).[6] 34 C.F.R. § 300 13(b)(4)

Note 5 — *(Continued)*

dialysis usually can be performed outside of "school hours" and thus would not meet the Fifth Circuit criteria. What other physician-prescribed "life support" services might have to be provided to a given child by a school district under the EHA should be examined in the context of each particular case presented , keeping in mind the three limiting factors set out by the Court below: (1) is the child in question handicapped and in need of special education? (2) is the service needed to assist the child to benefit from the special education to be provided? and (3) can the service be provided by someone other than a physician?

6. If the decision of the Court of Appeals below truly opened the floodgates to a public-school-administered national health system as imagined by Petitioner, the State of Texas, the State Board of Education and the Texas Education Agency, responsible under federal and state law for supervising and significantly funding local district compliance with the EHA, would be no less adversely affected than Petitioner. Note that although the State Board of Education agreed with Petitioner's position in 1979, the State Defendants did not argue against CIC as a related service at trial or on appeal and have not joined Petitioner in seeking this Court's review of the Court of Appeals decision.

Finally, since it has been found that children such as Amber eventually can learn to self-catheterize—App. 10a; *Tokarcik, supra*, at 458-459—this case may well be moot by the time this Court could reach a decision.

III. The Decision of the Court of Appeals is not in Conflict with any Decision of this Court.

The decision of the Court of Appeals below is consistent with this Court's interpretation of the EHA in *Board of Education v. Rowley*, ____ U.S. ____, 102 S.Ct. 3034 (1982). In that decision, this Court concluded that the purpose and intent of the EHA is first "to make public education available to handicapped children" and next "to make such access [to public education] meaningful." *Id.* at 3037. Consequently:

> The statutory definition of "free appropriate public education," in addition to requiring that the State provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a child *to benefit* from special education." §1401 (17) (emphasis added).

Id. at 3048. As noted in Part I above, the Courts below (as well as those in *Tokarcik*) have found as a fact that the supportive service of CIC is required to assist Amber to benefit from special education because without it she cannot attend class to receive the specially designed instruction. Thus, the denial of CIC presents Amber with two choices, either of which is offensive to the EHA as illuminated in *Rowley*: (1) to be deprived of access to public education, or (2) to be provided access which is not meaningful. Attending class at risk to her health (and possibly her life) can hardly be considered "meaningful" or "beneficial."

If the approach of the Court of Appeals below to related services under the EHA were incorrect under *Rowley*, the logical opportunity for this Court to signal such was presented by the petition for *certiori* in *Scanlon v. Tokarcik, supra*, denial of

which immediately followed *Rowley* and preceded (and thus could have prevented error in) *Tatro II*. In *Springdale School District v. Grace*, ____ U.S. ____, 102 S.Ct.3504 (1982), two days after the *Rowley* decision, this Court remanded the case for reconsideration in light of *Rowley*. Obviously, then, in the immediate aftermath of *Rowley*, this Court scrutinized EHA decisions on petition for *certiorari* for their consistency with *Rowley*. However, in the case of *Tokarcik*, in which the Third Circuit's treatment of CIC as a related service was indistinguishable from (and relied upon) that of the Fifth Circuit in *Tatro I*, this Court simply denied *certiorari*, without remanding for reconsideration in view of *Rowley*.

This Court in *Rowley* indicated that great weight and deference should be given to the decision of the Impartial Hearing Officer. *Id.* at 3051. *Accord*: "I believe that the District Court and Court of Appeals should have given greater deference than they did to the findings of the . . . impartial hearing officer and the State's Commissioner of Education . . ." *Id.* at 3053 (Blackmun, J., concurring). In the instant case, the District Court and Court of Appeals have reached the same result as the Impartial Hearing Officer and the State Commissioner of Education.[7] App. 3a, 66a.

The Court of Appeals decision below is not in conflict with *Southeastern Community College v. Davis, supra*. The latter decision concerned the application of Section 504 in the context of an institution of *higher* education. However, this Court has consistently recognized a critical distinction between public postsecondary educational institutions on the one hand and public pre-school, elementary and secondary schools on the other. *Martinez v. Bynum*, ____ U.S. ____, 103 S.Ct. 1838

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7. The decision of the Hearing Officer, adopted by the Commissioner, was reversed by the State Board of Education. However, as noted by the Court of Appeals below, the State Board had no authority under 20 U.S.C. § 1415 "to review the decisions of an independent hearing officer." App. 83a n. 10, citing *Helms v. McDaniel*, 657 F.2d 800 (5th Cir. 1981) at 805-806 & n. 9, *cert. denied* 455 U.S. 946 (1982). Consequently, the State Board decision in Petitioner's favor is not entitled to the weight and deference contemplated by *Rowley, supra*.

(1983) at 51 U.S.L.W. 4527; *Tilton v. Richardson*, 403 U.S. 672 (1971) at 685-686; *Brown v. Board of Education*, 347 U.S. 413 (1954) at 494. Accordingly, a public school district legally may be compelled to take more steps and incur heavier burdens, in order to prevent the denial of its benefits to a handicapped student, than could be imposed on an institution of higher learning. See also *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981) at 350, *cert. denied*, ____ U.S. ____, 102 S.Ct. 566 (1981). Further, as noted by the Court of Appeals below, Respondent Amber Tatro, unlike the plaintiff/respondent Francis Davis, is capable of benefiting from the program offered, if given reasonable accommodations to permit her access to it. App. 80a, 108a.

The Court of Appeals decision below is not inconsistent with *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981). That decision held that when Congress seeks to impose requirements on the states in a funding statute pursuant to its spending power, it must do so in such a manner as to give a state fair notice of what is expected of it, so that the state can make an informed decision as to whether to participate in the funding program and be bound by the act's obligations. By listing such things as physical therapy, audiology, psychological services, etc. in § 1401(17), Congress gave fair notice to the states that the EHA would require school districts to provide services not traditionally offered in the public schools.[8] By emphasizing "individualized" services to meet each child's "unique needs," § 1401(16)-(19), Congress indicated that the list of services in subsection (17) was not (indeed, could not be) exhaustive—a point made explicit in the 1977 implementing regulations. 34 C.F.R. § 300.13 *Comment; Tokarcik, supra*, at 457. By including, as examples, such services as physical therapy

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8. Note that prior to the enactment of §16.104 of the Texas Education Code, to "ensure state compliance with requirements for supplemental federal funding for . . . the delivery of instructional or related services to handicapped students," *Id.* at (a) (1), Texas law made no provision at all for related services to handicapped students, except for special transportation. Compare § 16.104 (Vernon Supp. 1983) with its predecessor § 16.16 (Vernon 1972).

and audiology, Congress clearly revealed that related services could include services which must be prescribed by a physician and performed by paramedical personnel. By including transportation in the illustrative list, Congress made the states aware that related services could include services needed by the child in order to be present at school. Finally, § 1412(5)(B) leaves no doubt that a state is responsible for supplementary aids and services needed to enable a child to be educated in the regular school environment. Consequently, the EHA gave fair notice to Texas that a child such as Amber would be entitled to a physician-prescribed supportive service which, though not specified by name in the Act, is needed to enable her to attend public school and participate without undue risk to her health in the regular educational environment.

CONCLUSION

In view of all the foregoing, it is clear that the criteria for granting a Writ of Certiorari have not been met. Accordingly, the Petition should be denied.

Respectfully submitted,

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